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In The

Supreme Court of the United States

SUSAN TAVE ZELMAN, Superintendent Of Public Instruction, *et al.*,

Petitioners,

v.

DORIS SIMMONS-HARRIS, *et al.*,

Respondents.

And Related Cases

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF AMICUS CURIAE OF RUDOLPH W. GIULIANI AND JOHN O. NORQUIST IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICI CURIAE

Mayor Rudolph W. Giuliani of New York, as chief executive of the city with the largest public school system in the country, has proposed several pilot programs for publicly funded school choice programs modeled upon the Milwaukee plan. Mayor Giuliani has also collaborated in a successful privately funded school choice program. Mayor John O. Norquist of Milwaukee is chief executive of the city with the largest publicly funded school choice program in the United States. Mayor Norquist has long supported school choice in order to stimulate the Milwaukee Public Schools to improve, provide Milwaukee parents with more educational options, and transform Milwaukee's overall educational system into a reason for living in Milwaukee. Each mayor oversees a city whose public education system has many excellent teachers and principals as well as many fine individual schools, but which has consistently failed as a whole to educate successfully the great majority of the city's children.[1]

The mayors joining in this brief support the petitioners in this case. Both mayors have supported the adoption of a new policy (which, in the case of Milwaukee, has become law) that permits low-income parents to direct state per-pupil education assistance to the parent's choice of a public, private non-sectarian, or parochial school. They seek a dynamic market in K-12 urban education that will put intense competitive pressure on their public school systems to improve and that will

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[1] Counsel for the parties in this case did not author this brief in whole or in part. No person or entity, other than *amici curiae* and their counsel, made a monetary contribution to the preparation and submission of this brief.

provide the poor with educational alternatives they cannot now afford, thus helping their cities to revive. While each mayor may not subscribe to all particulars of every argument set forth, they agree that the Establishment Clause, as construed by the Court, does not prohibit the kind of school choice program that Wisconsin and Ohio have adopted.

ABBREVIATED SUMMARY OF THE CASE

Both Wisconsin's and Ohio's school financing systems are complex, but they share one key feature. Historically, both allowed parents to direct the state's per-pupil aid only to public schools. In the 1990's, however, first Wisconsin and later Ohio added the unique feature around which this case swirls. Both states gave school choice to low-income parents in their biggest cities with the most troubled public school systems, Milwaukee and Cleveland. The Milwaukee Parental Choice Program (MPCP), Wis. Stat. Sec. 119.23, as amended, and the Cleveland Pilot Project Scholarship Program (CPPSP), Ohio Rev. Code 3313.974-3313.979, authorized low-income parents to direct a portion of the state's per-pupil aid payment to their choice of a public school, private nonsectarian school, or parochial school.

The Wisconsin and Ohio programs meet the Neutrality Test requirement that a state neither endorse a school, nor otherwise apply overt or subtle pressure on parents or students to attend or refrain from attending it, either because it is or is not a religious school. *Everson v. Board of Education*, 330 U.S. 1 (1947); *Rosenberger v. Rectors and Visitors of the University of Virginia*, 515 U.S. 819 (1995); *Mitchell v. Helms*, 530 U.S. 793 (2000). This case

hinges on three additional Establishment Clause concerns that have emerged from the Court's decisions in *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973); *Mueller v. Allen*, 463 U.S. 388 (1983); *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986); *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993); and *Agostini v. Felton*, 521 U.S. 203 (1997). These cases make clear that state education aid programs that provide school choice are permissible if they (1) allow the parent or student to direct state aid even-handedly, as on a level playing field, to all types of schools, including public as well as private schools, and giving equal treatment to non-sectarian and parochial schools; (2) have a secular purpose; (3) have a primarily secular effect.

This brief *amicus curiae* will show that both the Wisconsin and Ohio school choice programs meet all relevant Establishment Clause standards in their effort to create a well-functioning market of competing urban schools, improve city children's educational performance, and help cities themselves to revive

SUMMARY OF THE ARGUMENT

Although the legal issue in this case is narrow, its reach is momentous. It will decide whether the states, by injecting choice and competition into urban K-12 education, can create an effective market in K-12 schooling that succeeds in adequately educating most city children, an outcome America's cities desperately need in order to thrive again.

America's big cities are poised on the brink of recovery. Government, which dispersed their populations,

spread out their landscapes, and damaged their core markets during the post-war era, has reversed many of the policies on crime, welfare, and urban design that triggered urban decline. As a result, cities and their markets have begun to rebound. The one huge, seemingly immovable obstacle to recovery is cities' K-12 education systems: powerful and unresponsive monopolies, to which states give virtually all public funds for K-12 education, and which fail to educate successfully most poor and near-poor students while driving middle class parents to suburbs (where their purchasing power gives them a wide selection of schools).

A few states – first Wisconsin, and later Ohio – finally acted to restructure urban education, in an attempt to rescue the education of big-city children and the cities they inhabit. Both states' legislatures ended the monopoly over state per-pupil payments that, historically, public school districts alone enjoyed. They substituted, in Milwaukee and Cleveland, a system of school choice that lets low-income parents direct state per-pupil aid to whatever school the parents believe will best educate their children: public, private non-sectarian, or parochial.

The Court has consistently construed the Establishment Clause in a manner that permits state legislatures, the laboratories of our democracy, to pursue this type of bold (if controversial) experiment. Both the Wisconsin and Ohio programs are neutral and even-handed as to the educational choices parents make. Both state programs create a level playing field that includes public as well as private schools (if anything, favoring public schools over non-public ones) and that treats private non-sectarian and parochial schools the same. Both programs meet the

Lemon tests for secular purpose and primary secular effect.

The Court should reverse the judgment of the 6th Circuit Court of Appeals, and allow states to proceed with well-crafted school reform plans that inject choice and competition into urban education, revive our cities' moribund markets in K-12 schooling, and permit America's cities to complete their rebirth.

ARGUMENT

I. THIS CASE WILL DECIDE WHETHER AMERICA'S CITIES CAN DEVELOP A DYNAMIC MARKET IN K-12 EDUCATION WHERE SCHOOL CHOICE AND COMPETITION IMPROVE SCHOOLS' PERFORMANCE AND TURN URBAN CHILDREN INTO THE WELL-EDUCATED ADULTS CITIES NEED TO THRIVE AGAIN.

This case will do far more than determine whether several thousand vulnerable children in Milwaukee and Cleveland receive a decent education. It will ultimately decide whether American cities can develop a dynamic and productive market in K-12 education, which our cities desperately need to thrive again.

A. Cities Can Succeed Only If All Their Core Markets, Including K-12 Education, Are Allowed to Function.

Cities can succeed – cities can accomplish their mission of creating wealth and civilization[2] – only if government protects their fundamental structure and nurtures

[2] The Latin word *civitas* is the root word for both cities and civilization.

their core markets.[3] Population density and proximity define a city's structure. Four core markets, shaped by the city's structure, drive its economy. The urban labor market is the primary reason adults come to cities and remain there: to exchange their labor for the highest wages paid by thousands of competing nearby employers. The urban consumption market relies on the basic structure of a city – the physical proximity between buyers and sellers, and the grid of streets lined with shops – to match buyers' wants with sellers' supplies, and to stimulate the competition that drives down price and improves quality through rising productivity. The urban market for allocating capital depends on a city's population density and proximity, as well as its network of sidewalks, streets, streetcars, subways, trains, and multiple gathering places, to optimize the flow of information between investors and firms and to rationally allocate capital.[4]

The fourth core urban market is education. Schools are the primary mechanism for converting raw youth into a value-adding workforce (whose pursuit of employment then sustains the virtuous urban cycle of smooth labor exchange, efficient consumption, and rational allocation of capital). Because (1) the student population in a city is both huge and concentrated, (2) the number of schools is large, and (3) the two key ingredients for a market, wide choice and intense competition, are both possible, cities provide an ideal venue for connecting a diverse student

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[3] See John O. Norquist, *The Wealth of Cities: Revitalizing the Centers of American Life* (Addison, Wesley, 1998), for a more detailed discussion of urban structure and markets and the impact of government policy on cities' success.

[4] Norquist, pp. 18-20.

population to the best-fitting schools and turning them into highly-educated adults.[5]

Cities *ought* to have excellent K-12 schools. Rather than flee cities because of their schools, middle class parents should be flocking *into* cities to take advantage of the wide array of superb K-12 choices and superior educational performance that arise from intense urban school competition. But flocking *into* big cities to get an excellent education happens in the United States only when it comes to higher education. No middle class or wealthy family moves to New Haven, Chicago, or Washington, D.C., to enroll their children in those cities' K-12 school systems. Yet parents from across the nation (and around the world) gladly send their children to New Haven to attend Yale; to Chicago's south side to enroll at the University of Chicago; or to Washington, D.C. to attend Georgetown. Why don't big cities K-12 schools succeed like their world-class universities?

B. Government's Policy of Granting a Finance Monopoly to City K-12 School Systems, Rather Than Allowing an Education Market to Flourish, Is the Primary Reason Urban School Systems Fail.

The main reason why America's big cities have failing K-12 school systems but world-class universities is the difference between how government structures and finances urban K-12 schools versus how it structures and finances urban universities. Federal and state government provide massive funding to both big-city K-12 schools and big city universities. But government, the

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[5] Norquist, pp. 20-21.

dominant financier of K-12 education, requires that virtually all K-12 spending must go to public schools. Government funding for higher education, by contrast, permits a high degree of school choice. The GI bill, the federal Pell Grant program, and state tuition grant programs give aid directly to students, who then choose whether to direct the money to a public, private nonsectarian, or parochial school.[6]

It is no coincidence that "choice-rich" urban universities do such a splendid job while "choice-poor" K-12 school systems fail to educate a huge portion of urban children. Choice stimulates competition. Competition improves outcomes. As Thomas Jefferson wrote: "I have thought it better for the public to go to market for whatever it wants which is to be found there."[7] By denying choice to the vast majority of urban children, choking off inter-school competition, and suppressing the K-12 education market, government has condemned urban K-12

[6] *Amicus* Norquist, for instance, while a resident of the State of Illinois, used an Illinois Tuition Grant scholarship to attend Augustana College, a private Lutheran College located in Rock Island, Illinois. Later, as a Wisconsin State Senator, Norquist helped craft the Wisconsin Legislature's Tuition Grant program, under which a qualifying Wisconsin resident receives a scholarship that can be turned over to a public school like the University of Wisconsin, a private non-religious school like Lawrence University in Appleton, or a private school with a major religious affiliation such as Marquette University in Milwaukee.

[7] Thomas Jefferson to William B. Bibb, 1808, *The Writings of Thomas Jefferson*, Memorial Edition, Lipscomb and Bergh, editors, 1903-04, Vol. 12, p. 107.

school systems to failure in their attempt to educate most city children.[8]

New York City, with its 1,100,000 public school students from almost every nation on earth, is a prime example of the deficiencies of the present monopolistic public education system. The Mayor appoints only two of the seven member of the New York City Board of Education, which in turn appoints the Chancellor who runs the daily operations of the school system. The Chancellor presides over a huge bureaucracy of 3,700 central administrators (3,500 more than in the 1950s when the system served the same number of children far more successfully) as well as over 32 semi-autonomous local school boards with an additional 1,200 administrators. This structure diffuses responsibility to such an extent that no one is ultimately answerable to the citizenry, particularly to the parents who entrust their children's education to the system.

As a consequence of this unwieldy structure, the City school system has slowly deteriorated over the past 30

[8] The social and economic problems that urban children bring to school, the inequitable funding of both city and rural education, and other factors contribute to the problem. But most urban teachers and principals are committed and competent, and many individual urban schools overcome their students' handicaps and their own lack of resources to produce well-educated pupils. The problem with urban education lies in the system as a whole. Like other large monopolies, urban K-12 school systems are incapable of improving their performance across the board because their student populations are captive and no one in the system faces a significant financial incentive to do better personally or, more importantly, ensure that the school does better.

years, with costs rising almost in direct proportion to falling test scores. From fiscal year 1997 to fiscal year 2001, spending for operating costs alone rose from $8.1 billion to almost $12 billion. The average amount spent per pupil since 1970 has increased by 48% in constant dollars. Yet although the City spends 30% more per pupil than the national average and its pupil-to-teacher ratio has fallen from 30:1 in the 1950s to 12:1 in the 1990s, school performance has deteriorated as sharply as in virtually all other big-city school districts.

In 2000, only 40% of elementary school students scored at an acceptable performance level on the citywide reading test, and only 33% performed acceptably on the math test. At the high school level, no more than 50% of public school students complete their studies within the normal four years, and only 58% receive a traditional high school diploma in seven years. In 1998, the most recent year for which data is available, only 16% of City students passed all five parts of the State Regents exam, compared to 59% for the remainder of New York State. City public school students also score lower on national standardized tests. Even though only 35% on average took the SAT between 1996 and 1999, compared to 73% of New York State students, City students consistently scored about 40 points lower than the state average.[9]

[9] Emanuel Tobier, "New York City Public Schools: The Facts About Spending and Performance," Manhattan Institute for Policy Research, Civic Bulletin No. 26, May 2001. Elementary student results on statewide reading and math tests are different but also low. See Appendix A.

Since 1989, the New York State Education Department has been issuing a list of low performing public schools that are targeted for corrective action and run the risk of being closed if significant improvements are not made. Nearly 90% of the schools placed on this SURR list (Schools Under-Registration Review) have been located in New York City, even though only 20% of the schools in the state are New York City public schools. Presently 98 of 114 schools on the list come from the City's five boroughs. A disproportionate number of the children attending these schools are African-American or Hispanic, and the schools have a disproportionate number of teachers who are not fully certified and have less than five years of experience in the classroom.[10]

New York City is not unique in its inability to provide most of its children an adequate education. As Appendix A illustrates, America's big-city public schools systems across the board have low graduation rates. The great majority of urban students in Milwaukee and Cleveland also perform poorly on standardized reading and math tests. The education finance monopoly takes a terrible toll in the thwarted dreams of our nation's most vulnerable children.

C. The Lack of a Market in K-12 Education is an Aberration.

For most of American history before 1945, government respected cities' essential urban features, population density and proximity. Government did not disrupt

[10] Joseph P. Viteritti, "The Tip of the Iceberg: SURR Schools and Academic Failure in New York City," Manhattan Institute for Policy Research, Civic Report No. 16, July 2001.

most of cities' core markets. The exception was K-12 education. Government, the dominant financier of K-12 education, has funded only public schools since the mid-19th century, suppressing for 150 years the growth of a market in urban K-12 education.

Only after our country won World War II did government policy across the board become hostile to America's cities. For the next 50 years, government policies helped to decimate cities' population, undermine their proximity, and injure all four urban markets. Government's failure to contain crime, especially during the period 1960-1990, inflicted enormous harm on cities' density and labor markets.[11] Welfare policy also damaged cities' labor markets, as government expanded AFDC and related welfare programs that paid poor parents more *not* to work than

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[11] From 1950 to 1990, crime in America's cities climbed steeply. Appendix B depicts the trend in Milwaukee, where the Total Index Crime increased sevenfold from under 8,000 to over 55,000 reported crimes. Law enforcement officials in many cities focused so intensively on fighting "serious" crime that they stopped clamping down hard on "low level" criminal conduct like graffiti, public disturbances, street prostitution and other types of public disorder. But it is precisely the lack of public order that creates an environment conducive to crime, frightens ordinary citizens, and drives those who can to leave disorderly city neighborhoods for safer territory. See James Q. Wilson and George L. Kelling, "Broken Windows," *The Atlantic Monthly*, March 1982, pp. 29-38. The resulting depopulation of many U.S. cities, and especially the exodus of so many middle class families, helped create a new "spatial mismatch" between inner-city jobseekers and suburban job vacancies, which increased unemployment and disrupted the normal workings of the job market. See William Julius Wilson, *The Truly Disadvantaged: The Inner City, the Underclass, and Public Policy* (University of Chicago Press, 1987).

to take a job.[12] Government "urban renewal" and transportation policies meanwhile brutalized America's cities, obliterating entire working class neighborhoods in order to construct monstrous, dysfunctional housing projects, and ramming big multi-lane roads through some of the densest neighborhoods in the United States. Finally, government continued throughout the 1945-90 period to deny school choice, thwart competition and suppress cities' natural markets in K-12 education.

Not until the 1990s did government begin to reverse its destructive policies, except in education. In the 1990s, police and prosecutors began to adopt effective crime-fighting techniques, including the "broken windows" strategy of law enforcement, under which the police concentrate not only on "serious" crimes (like murder, rape, and robbery) but on "quality of life" offenses (like graffiti, public drunkenness, etc.). Reinforced by a generally good national economy, these new techniques produced dramatic reductions in urban crime. The sharp drop in crime in turn helped to improve the urban labor

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[12] From 1950 to 1994, the Aid to Families with Dependent Children (AFDC) caseload rose from under 1 million to nearly 5 million families. Appendix C depicts the trend. Paralleling the growth of AFDC, central city poverty rates (after an initial decline in the early 1960s due to improvements in the Social Security program for retirees) also rose. Appendix D shows the growth in the central city population below the federal poverty line from 12.7% in 1969 to 21.5% by 1993. The growth in welfare and poverty also harmed cities' consumption markets. Although even the poorest urban neighborhoods often have greater purchasing power per square mile than the most affluent suburb, the rise in AFDC and poverty from the mid-1960s to the mid-1990s reduced that purchasing power.

market by inducing some retailers and manufacturers to return to the city.[13]

In the mid-1990s, government also reversed course on welfare, replacing AFDC with a new system that encourages work and supports workers. Instead of paying the poor *not* to work and thus disrupting the labor market, government began to help low-income adults to find and sustain employment within the labor market.[14] The 1990s also witnessed a major reversal of government policy on the design of cities. Government stopped

[13] Appendix B depicts the reduction in Total Index Crime in Milwaukee from 1990 to 2000 from over 55,000 to under 45,000 reported crimes. See Wilson and Kelling, "Broken Windows" and "Making Neighborhoods Safe," *The Atlantic Monthly*, February 1989, pp. 46-52 for a fuller description of the "broken windows" approach to reducing crimes by restoring public order.

[14] The new federal program, Temporary Assistance to Needy Families (TANF), limits cash payments, requires work activity, and directs states to connect impoverished parents to the labor market. During the 1990s, the federal government also dramatically expanded the Earned Income Tax Credit, which supplements low-wage workers' earnings, and funded child care and health insurance for low-income workers. The new policy, coupled with the economic boom of the 1990s, quickly shrunk America's welfare roles by half between 1994 and 2000, from over 5 million families to under 2.5 million families. See Appendix C. In some states caseloads dropped even more: Wisconsin's caseload dropped by 80%. While a troubling fraction of the former AFDC population has ended up in homeless shelters and food pantries, the great majority of welfare recipients ended up in jobs. Poverty in the U.S. in general declined between 1993 and 1999, and central city poverty fell from 21.5% to 16.4% of the central city population. See Appendix D.

building wretched housing projects, and chose instead to demolish some and reconfigure others with traditional city street grids.[15] A new appreciation of the classic urban form took hold among city planners and elected officials. Middle class Americans rediscovered the intimacy and excitement of big cities. Young adults and retired couples – virtually all, sadly, without school-age children – began to move into city lofts and condominiums.

Urban education stands apart as the one area where government during the 1990s failed to repair the damage its policies have inflicted on cities. Government refused to give up on the monopoly model of organizing and financing K-12 schools. Its failure to resuscitate the natural urban market in K-12 education undermines the progress that America's cities made during the 1990s on every other front.

Recognizing the states' role as America's experimental laboratories, first Wisconsin's and then Ohio's legislature finally ventured in the mid-1990s to end the historic monopoly over per pupil state aid for K-12 students that each state had granted to public schools. Both states passed laws that gave educational choice to the poorest city students in Milwaukee and Cleveland, allowing their

[15] The nationally televised demolition of the Pruitt-Igoe housing project in St. Louis in 1972 prefigured other less notorious demolitions. Milwaukee's rehabilitation of its Hillside housing development, which involved rebuilding the old city street grid, installing ornamental street lights, adding porches onto most units, and building an addition to the Boys and Girls Club, won several national awards.

parents to direct state per pupil aid to whatever K-12 schools their parents thought would best educate their children regardless of whether the school is public, private non-sectarian, or parochial. The larger issue in this case is whether the Court will let states proceed to forge the missing link – the creation of a dynamic market in K-12 education – without which the revival of America's great cities will never be complete.

II. WISCONSIN AND OHIO HAVE RECAST THEIR PROGRAMS THAT HISTORICALLY SENT STATE PER-PUPIL AID PAYMENTS ONLY TO PUBLIC SCHOOLS INTO EVEN-HANDED PROGRAMS THAT PERMIT MILWAUKEE'S AND CLEVELAND'S POOR PARENTS TO DIRECT AID TO THE PARENTS' CHOICE OF A PUBLIC, PRIVATE, OR PAROCHIAL SCHOOL.

The Wisconsin and Ohio school aid formulas are extremely complex. The Milwaukee Parental Choice Program (MPCP) and the Cleveland Pilot Project Scholarship Program (CPPSP) added to the complexity by allowing low-income parents in Milwaukee and Cleveland to direct a portion of the aid to the parents' choice of a public, private non-sectarian or parochial school. The bottom line, however, can be reduced to a simple chart:[16]

[16] The chart is compiled from the following sources: Memo from Bob Lang, Director, Wisconsin Legislative Fiscal Bureau, to Members of the Wisconsin Legislature, "2000-01 Estimated State Support for School Districts," February 15, 2001; Wisconsin Department of Public Instruction, "Milwaukee Parental Choice Program (MPCP): MPCP Facts and Figures for 2001-2002"; Ohio Rev. Code at 3317.02(B); and Ohio Rev. Code 3313.974-3313.979.

Type of School	State Aid Per Student (2000-2001)
Milwaukee:	
Public	$5,670 in "general school aids" plus categorical aid
Private Non-Sectarian	$5,326
Parochial	$5,326
Cleveland:	
Public-Cleveland City School District	$4,294 "base formula amount" plus: • cost of doing business adjustment • categorical aid • extra payment if student is enrolled in a tutoring program
Public-suburban district	$4,294 "base formula amount" plus: • cost of doing business adjustment • categorical aid • extra $2,250
Private Non-Sectarian	$2,250
Parochial	$2,250

Under both programs, the public school district stands to gain or lose its entire base per pupil payment ($5,670 in "general school aids" in the case of Milwaukee, or $4,294 in "base formula payment" in the case of Cleveland, using 2000-2001 school year dollars) whenever a parent chooses to enroll or disenroll a student in one of the district's public schools. A private non-sectarian or parochial school stands to gain or lose a percentage of the state's base per-pupil payment (approximately 94% or $5,326 in the case of Milwaukee, and 52% or $2,250 in

Cleveland) should the parent instead choose to enroll or disenroll the student in a non-public school.

The two states' approaches differ in some of their details, but the key feature they share is the only one that matters for Establishment Clause purposes. Only as part of a general statewide program that allows a parent to freely direct a minimum state per-pupil aid payment to the parent's choice of a public school may Milwaukee's or Cleveland's low-income parents send state dollars to a private secular or religious school.[17]

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[17] As early as the 1970s, the Wisconsin Legislature started creating programs that allowed parents to send their children to and direct a portion of the state's per pupil aid payment to "non-traditional" public or private non-sectarian schools. In 1976, the Wisconsin Legislature allowed minority students, mostly from Milwaukee, to carry state aid to suburban schools. Wis. Stat. Secs. 121.845-121.87. In 1985 the legislature permitted at-risk students, of whom Milwaukee has a disproportionate share, to carry state aid to private, non-sectarian schools. Wis. Stat. Sec. 118.153. In 1990, the original Milwaukee Parental Choice Program (MPCP) became law, permitting a very small number of low-income Milwaukee children to attend – and direct state aid to – private, non-sectarian schools. The 1991 Post-Secondary Enrollment Options (now Youth Options) program, which permits high school students to attend college classes, Wis. Stat. Sec. 118.37, renumbered Wis. Stat. Sec. 118.55; the 1993 legislation authorizing charter schools, Wis. Stat. Sec. 118.40; the recent Open Enrollment law that allows all Wisconsin children to transfer to other public school districts, Wis. Stat. Sec. 118.51; and the even more recent law that authorized the University of Wisconsin-Milwaukee, the Milwaukee Area Technical College, and the City of Milwaukee to grant charters to schools, Sec. Wis. Stat. 118.40 (2r); all permit parents of Wisconsin children – in some cases, Milwaukee children only – to direct state education aid to either a public or private non-sectarian school if the parents believe the alternative is a better choice. Ohio has similarly given Cleveland

III. THE PURPOSE AND PRIMARY EFFECT OF WISCONSIN'S AND OHIO'S SCHOOL CHOICE PROGRAMS HAS BEEN TO PUT INTENSE COMPETITIVE PRESSURE ON THE PUBLIC SCHOOLS TO IMPROVE THEIR PERFORMANCE AND TO GIVE DISSATISFIED PARENTS ADDITIONAL EDUCATIONAL OPTIONS, NOT TO HELP OUT PAROCHIAL SCHOOLS.

Both Wisconsin's and Ohio's rationale for school choice rested on two secular objectives:

First, to put intense pressure on the public school system to dramatically improve its educational effectiveness by compelling it to compete for students.

Second, to give parents and students who are dissatisfied with their traditional public school assignments a wider array of alternatives that meet the students' educational needs.

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parents the option to enroll their children in certain "non-traditional" public or private non-sectarian schools. In 1999-2000, 16,184 Cleveland students took $7,097 each to "magnet" schools, while 2,087 brought $4,518 per pupil to "community" (charter) schools. While these programs expanded parental choice and marginally reduced the Milwaukee and Cleveland public school districts' monopolies, they were a very narrow partial measure. Some students did not qualify, and the number of available seats in alternative non-public schools was very limited. Above all, the main source of alternative schooling – parochial schools – were excluded. The Wisconsin and Ohio Legislatures therefore decided, consistent with *Nyquist*, that in order to create intense competitive pressure on all schools and maximize the number of educational options, state aid should be made available regardless of the public/nonpublic or sectarian/non-sectarian nature of the school.

The Wisconsin record is quite clear that both of these secular purposes constituted the motivation for amending the Milwaukee program to include more students and add the option of parochial schools.[18] Ohio's secular intent is also plain.[19]

In both states, the new policy achieved its secular purpose and produced a primarily secular effect. There is widespread consensus in Wisconsin and among scholars that the expansion of the MPCP to additional students and parochial schools succeeded in putting intensive competitive pressure on Milwaukee Public School to improve the public schools for the vast majority of Milwaukee's school children who continue there.[20]

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[18] As the Wisconsin Supreme Court stated, "[T]he secular purpose of the amended MPCP . . . is virtually conceded." *Jackson v. Benson*, 218 Wis.2d 835 at 857, 578 N.W. 2d 602 at 612 (Wisc. 1998), *cert. denied*, 525 U.S. 997 (1998).

[19] As the Court declared in *Mueller*, "A state's decision to defray the cost of educational expenses incurred by parents – regardless of the type of schools their children attend – evidences a purpose that is both secular and understandable." 463 U.S. at 395.

[20] See Caroline M. Hoxby, Harvard University and National Bureau of Economic Research, "School Choice and School Productivity (Or, Could School Choice Be a Tide That Lifts All Boats," Conference on the Economics of School Choice, Islamorada, FL, February 22-24, 2001, p. 40. ("Overall, an evaluation of Milwaukee suggests that public schools have a strong, positive productivity response to competition from vouchers. The schools that faced the most potential competition from vouchers had the best productivity response. In fact, the schools that were most treated to competition had dramatic productivity improvements. . . . [T]he productivity effects of competition may be understated because the control group of schools was a slightly unfair comparison group with fewer poor and minority students.") See, also, Sam Schulhofer-Wohl,

Under pressure from school choice, Milwaukee Public Schools went all out to improve its quality and appeal. Among other steps, Milwaukee Public Schools has (1) shut down and reconstituted dozens of failing schools; (2) negotiated with its teachers union an exciting new program to "counsel out" teachers whose skills or attitudes no longer justify their remaining in the classroom; (3) decentralized to the school level much of the responsibility for teacher hiring, school budgeting, and curriculum; (4) replicated specialty schools that historically turned students away because of space shortages (e.g., doubled the number of Montessori schools); (5) approved a massive neighborhood school initiative that will increase the number of schools that students can walk to; (6) converted numerous half-time K-4 kindergartens to full-time; (7) converted a large number of K-6 elementary schools to K-8; (8) embarked on a major expansion of before-school and after-school child care and recreation programs; (9) approved a record number of its own charter schools, including both conversions of regular public schools into charter schools and contracts with non-profit organizations; and (10) launched a massive citywide effort to publicize its successes to prospective and current parents.

"Choice Program Pushed Schools to Improve, Study Says," *Milwaukee Journal Sentinel*, April 24, 2001, and "Competition Helps MPS," editorial, *Milwaukee Journal Sentinel*, April 25, 2001 ("[Hoxby's] work does reinforce an impression shared by many observers, including this newspaper's Editorial Board, that school choice has prompted innovation within the Milwaukee Public Schools.")

The critics of school choice claimed that competitive pressure would cause Milwaukee Public Schools to fall apart soon after the expanded MPCP became law. Nothing of the sort happened. Notwithstanding a decline in the total citywide school age population from 151,710 in 1996 to 150,256 in 2001, Milwaukee Public Schools decisions to improve its quality, expand its programs, and reach out to parents and students in response to competitive pressure caused the public school district's enrollment to grow from 106,910 in 1996, to 107,905 in 2001.[21]

The second purpose for expanding Milwaukee's school choice program, i.e., to create more educational options, also came true. The Milwaukee program has made it possible for nearly 11,000 low-income children to attend over 100 private non-sectarian and parochial schools that previously were beyond their reach.[22]

Empirical evidence of the positive pressure the Cleveland program has placed on the Cleveland City School District to improve has not yet emerged. Both Milwaukee's experience and competitive theory, however, strongly suggest that Cleveland's public schools will seek to improve in response to the thousands of students who use the Cleveland program to attend non-sectarian and parochial schools. During the 1999-2000 school year,

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[21] Richard W. Moore, Director, and Susan Bergerson, Census Supervisor, Milwaukee Public Schools, "Comparative Statement of Annual School Census" in "City of Milwaukee Child Census," June 30, 2001. During the 1996-2001 period, the number of students attending private schools actually dropped from 27,934 to 26,479 even as the number participating in the MPCP grew from under 500 to approximately 9,600.

[22] Wisconsin Department of Public Instruction, "Milwaukee Parental Choice Program," p. 1.

approximately 3,800 Cleveland students used the CPPSP to attend 10 non-sectarian and 46 parochial schools. The second secular effect of the CPPSP is self-evident: the program enables thousands of poor Cleveland school children to take advantage of educational options their parents could otherwise not afford.

IV. ESTABLISHMENT CLAUSE PRINCIPLES AND PRECEDENTS DO NOT BAR EITHER WISCONSIN'S OR OHIO'S EVEN-HANDED PROGRAM OF LETTING LOW-INCOME PARENTS DECIDE TO DIRECT STATE PER-PUPIL AID TO THEIR CHOICE OF A PUBLIC, PRIVATE NON-SECTARIAN, OR PAROCHIAL SCHOOL.

This Court, in its ruling in *Nyquist*, reserved the question of whether the Constitution might tolerate "some form of public assistance (e.g., scholarships) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited." 413 U.S. at 756, n. 38 (1973). The school choice financing system that Wisconsin and Ohio have evolved presents exactly the kind of "public assistance . . . made generally available" that the *Nyquist* case pointed to.

Both states have created a system of state per-pupil aid payments, certainly a type of "public assistance." These per-pupil aid payments attach to every K-12 student in the state and "follow" *each* K-12 student to every public school district in Wisconsin or Ohio, which is surely what the Court meant in describing such public assistance as being "made generally available." Finally, both states have decided, in the case of each state's most troubled school district, that a percentage of the per-pupil aid that it provides to all students who attend public school (i.e., 94% in Milwaukee, 52% in Cleveland) may

alternatively be directed to a private non-sectarian or a parochial school. This makes such aid generally available "without regard to the sectarian-non-sectarian, or public-nonpublic nature of the institution benefited."

This case thus confronts the Court with the question *Nyquist* did not answer. Does the Establishment Clause tolerate a state K-12 education financing program, similar in economic structure to the federal GI Bill or Pell Grant programs for higher education, under which the state gives parents the right to direct per pupil aid to their choice of a public, private non-sectarian, or parochial school?

The first test, the Neutrality Test, requires that a state school choice plan that includes parochial schools must never endorse a school, or otherwise create any overt or subtle pressure on parents or students to attend or refrain from attending the school, either because it is, or is not, a religious school. *Everson*, 330 U.S. 1 (1947); *Rosenberger*, 515 U.S. 819 (1995); and *Mitchell*, 530 U.S. 793 (2000). Neither state program violates this fundamental obligation of state neutrality. The two programs' neutrality is not compromised by the fact that they allow taxpayer dollars to go to religious schools. In *Mitchell*, this Court overruled two prior cases, *Meek v. Pittenger*, 421 U.S. 349 (1975); and *Wolman v. Walter*, 433 U.S. 229 (1977), which struck down programs providing educational material and equipment to private and religious schools on the ground that they had the primary effect of advancing religion because the material and equipment constituted direct aid. The *Mitchell* Court held that, if aid is neutrally available and, before reaching or benefiting any religious school, first passes, either literally or figuratively, through the hands of numerous private citizens who are

free to direct the aid elsewhere, the government has not provided any support of religion for Establishment Clause purposes. Such is the case here.

The Courts' decisions over the years also suggest that, to satisfy the Neutrality Test a school choice program must create a level playing field for all three types of schools: public, private non-sectarian and parochial. When read together, *Nyquist*, *Mueller*, 463 U.S. 388 (1983); *Witters*, 474 U.S. 481 (1986); *Zobrest*, 509 U.S. 1 (1993); and *Agostini*, 521 U.S. 203 (1997), indicate that when state education aid is considered as a whole, aid for K-12 and even college students may not exclude the public schools and go only to private schools of both types, or otherwise discriminate against public schools in favor of private ones, any more than an aid program may discriminate against private non-sectarian schools in favor of parochial schools or vice versa. The beneficiaries of state per-pupil aid must be able to direct to public schools at least the same dollar amount that they send to nonpublic schools, and private non-sectarian and parochial schools must be treated identically.

The major breakthrough in the emergence of this level playing field requirement occurred in 1983 in *Mueller*, when the Court approved a Minnesota provision granting a tax deduction to parents for tuition, textbooks, and transportation. Unlike the New York law struck down in *Nyquist*, which benefited only private non-sectarian or parochial school children, the Minnesota program upheld in *Mueller* made assistance available to both public and nonpublic school populations, a fact the Court found to be significant in reaching its decision. *Mueller* is also a landmark ruling because it reinforced the idea of

parental choice and breathed new life into the child benefit concept. Justice Rehnquist wrote for the majority that, where "aid to parochial schools is only a result of decisions of individual parents, no 'imprimatur of state approval' can be deemed to have been conferred on any particular religion or on religion generally," 463 U.S. at 399.

In 1986, in a decision that continued this line of analysis, a unanimous Court held in *Witters* that there was no Establishment Clause violation when a blind student used a public scholarship to attend a Bible college. The reasoning in *Witters* focused on the fact that, again unlike the circumstances in *Nyquist*, the aid given here was made available to all students, not just those in non-public secular or sectarian schools. Justice Marshall, writing for the majority, indicated that, while some of this aid would find its way to religious schools, the benefit is "only the result of the genuinely independent private choices of aid recipients." 474 U.S. at 487. In a concurring opinion, Justice Powell, who wrote for the majority in *Nyquist*, outlined three factors that, until this day, set the criteria for determining whether aid to religious schools passes constitutional muster: (1) the program is neutral on its face regarding religion, (2) funds are equally available to public and private school students, and (3) any aid to sectarian institutions is the result of private choices by individuals. 474 U.S. at 491.

In 1993, in *Zobrest*, the Court reversed a Ninth Circuit decision and upheld the right of a parochial high school student to receive the services of a sign language interpreter under the provisions of the Individuals with Disabilities in Education Act. The same services were

available to public school children, but the student's parents chose to send him to a religious school. Citing *Mueller* and *Witters*, Chief Justice Rehnquist and a majority of the Court declared:

> When the government offers a neutral service on the premises of a sectarian school as part of a general program that "is in no way skewed toward religion" . . . it follows under our prior decisions that provision of that service does not offend the Establishment Clause. 509 U.S. at 10.

If there was any doubt of the direction the Court was taking in its deliberate refinement of the principles that guide its Establishment Clause decision-making, the question was resolved in 1997 in *Agostini*. Reversing *Aguilar v. Felton*, 473 U.S. 402 (1985), a decision that had prevented public school teachers from providing federally supported remedial services to poor children on the premises of parochial schools, the Court in *Agostini* affirmed the principle of a level playing field in state aid for public, private non-sectarian, and parochial schools.

The New York tuition reimbursement program struck down in *Nyquist* reimbursed low-income parents $50 to $100 per child *only* where they sent their children to non-public schools. New York's tax relief program granted tax relief *only* to middle-income parents of non-public school children. By contrast, like the programs upheld in *Witters*, *Zobrest*, and *Agostini*, the Wisconsin and Ohio school choice programs are part of a larger, comprehensive state per-pupil education aid program that provides assistance at either a public or non-public school, and treats non-sectarian and sectarian schools the same. Wisconsin's program, taken as a whole, allows at least $5,326 (in 2000-01) to be directed equally to all three types of schools: public, private non-sectarian, or parochial.

Ohio's program, taken as a whole, likewise allows parents to direct at least $2,250 to a public, private non-sectarian, or parochial school. In both states, public schools actually receive more. There is no difference in treatment between the two types of private schools.[23]

The other relevant Establishment Clause tests, articulated in *Lemon*, require that the state program must have both a clear secular purpose and a primary secular effect that neither advances nor inhibits religion. Both Wisconsin's and Ohio's programs meet these tests. The record makes clear that both states' programs sought to achieve an improvement in educational outcomes for the states' most vulnerable students: Milwaukee's and Cleveland's low-income, mostly minority students who inhabit the impoverished centers of the states' biggest metropolitan areas, and whose education performance fell far behind their peers.

Similarly, both Wisconsin's and Ohio's programs achieved a primarily secular effect. The Milwaukee program has spurred Milwaukee Public Schools to compete

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[23] Obviously, there are administrative differences in both states between the transfer of the aid payment to a public school and its transfer to a private school. In the case of public schools, the parent signs over no voucher; in the case of private schools, the parent must co-sign a voucher. In the case of public schools, the money goes to the system, not the individual school; whereas in the case of private schools, the money usually goes directly to the school. In *Nyquist*, *Mueller*, *Witters*, *Zobrest*, and *Agostini*, however, the Court did not get hung up on such details. The key question must be: when the state's education aid program is viewed as a whole, has the state established a level playing field that treats all three types of schools – public, private non-sectarian, and parochial – alike in all *important* respects?

and improve. The Cleveland program puts pressure on Cleveland Public Schools to pursue reform in the way it educates the majority of children who remain in the system.

The second secular effect of the program also deserves mention. Both Wisconsin's and Ohio's programs give parents who were dissatisfied with the public schools the ability to enroll their children in alternative schools that meet their children's needs.

V. CONCLUSION: THE COURT SHOULD RESPECT STATE DECISIONS TO CREATE EVEN-HANDED EXPERIMENTS IN SCHOOL CHOICE THAT WILL CREATE A DYNAMIC URBAN MARKET IN K-12 EDUCATION AND HELP INVIGORATE OUR NATION'S BIG CITIES.

Reasonable people can certainly disagree about the policy merits of school choice. Many Americans, and not just those linked to the teachers' unions or the education bureaucracy, truly believe that the public finance monopoly so long enjoyed by public schools is essential for urban education. Conventional reforms, they assert, such as smaller class sizes, higher salaries, more computers, and new curricula, are all we need to improve urban school outcomes.

We respect their views, but disagree. More importantly, the state legislatures of Wisconsin and Ohio disagreed. Both states voted to replace monopoly with school choice in Milwaukee and Cleveland out of a conviction that only intense competition for public dollars among all urban schools will work to elevate the performance of all schools.

The Court cannot disturb the two state legislatures' shared policy (be it right or wrong) unless the Court concludes that the Establishment Clause denies states the legal right to enact an even-handed per-pupil aid policy that includes not only public and private non-sectarian schools but parochial schools. We see nothing in the Court's many decisions on the Establishment Clause that would bar this type of across-the-board school choice plan. Rather, case after case – from *Everson* and *Nyquist* through *Rosenberger, Mitchell, Mueller, Witters, Zobrest,* and *Agostini* – supports the validity of the Wisconsin and Ohio approach. Both programs are neutral. Both allow state aid to go to public as well as non-public schools; both treat non-sectarian and parochial schools alike. Both programs aimed to achieve a secular purpose; both produced a primarily secular effect.

The Court should adhere to this long line of precedents, reverse the Judgment of the Court of Appeals, and allow states and cities to proceed with well-crafted school choice plans that inject competition into urban education and hold out the promise of reviving America's cities.

Respectfully submitted,

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APPENDIX A

U.S. Urban Public School Systems

		Students Attaining Proficiency in....	
	Graduation Rate*	Elementary** School	High School
U.S. Cities	**56%**		
Milwaukee:			**(1)**
Graduating	**43%**		
Reading		**54%**	**35%**
Math		**37%**	**11%**
Cleveland:			**(2)**
Graduating	**28%**		
Reading		**34%**	**41%**
Math		**34%**	**29%**
New York City:			**(3)**
Graduating	**43%**		
Reading		**42%**	**40%**
Math		**52%**	**41%**

*1998 graduation statistics based on all students entering 9th grade in 50 largest school districts.
**Elementary results based on statewide reading and math tests taken by 4th graders. Wisconsin: 2000-01, Ohio: 1999-2000, New York City: 1999-2000 for English and 2000-01 for Math

(1) Grade 10 Wisconsin Knowledge & Concepts Examination for 2000-01
(2) Grade 12 Ohio State Reading and Math Proficiency tests for 1999-2000

(3) English and Math Regents Exams for 1997-98

Sources:

U.S. Cities: Jay P. Greene, "Graduation Rates in the United States," The Manhattan Institute for Policy Research, August 28, 2001, Table 6, p. 34.

Milwaukee: Office of Research and Assessment, Milwaukee Public Schools, "2000-01 Accountability Report for the Milwaukee Public Schools, Volume 1, District Report, Chart 8, p. 6 and Chart 17, p. 12.

Cleveland: Ohio Department of Education, "State of Ohio 2001 District School Report Card," Cleveland City School District, Cuyahoga County" p. 2.

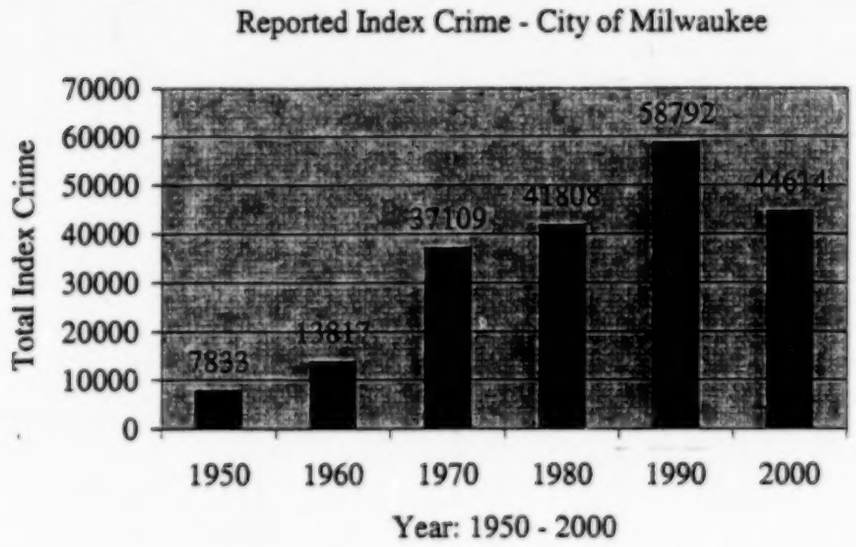
New York City: New York City Board of Education Division of Assessment and Accountability, "A Report on the Results of the CTB-Reading Test (CTB-R) Administration in New York City Including the Results of the State Grade 4 English Language Arts (ELA) Test," June 2000, Figure 5, p. 21.

New York City Board of Education Division of Assessment and Accountability, "Summary Report: Results of the 2001 State Elementary Assessment in Mathematics and the Intermediate Level Assessments in English Language Arts (ELA) and Mathematics," Figure 1, p. 3.

Joseph P. Viteritti, "State of the New York City Public Schools 2000," Manhattan Institute for Policy Research, Civic Report No. 13, Sept. 2000.

APPENDIX B

City of Milwaukee: Total Crime Index: 1950-2000

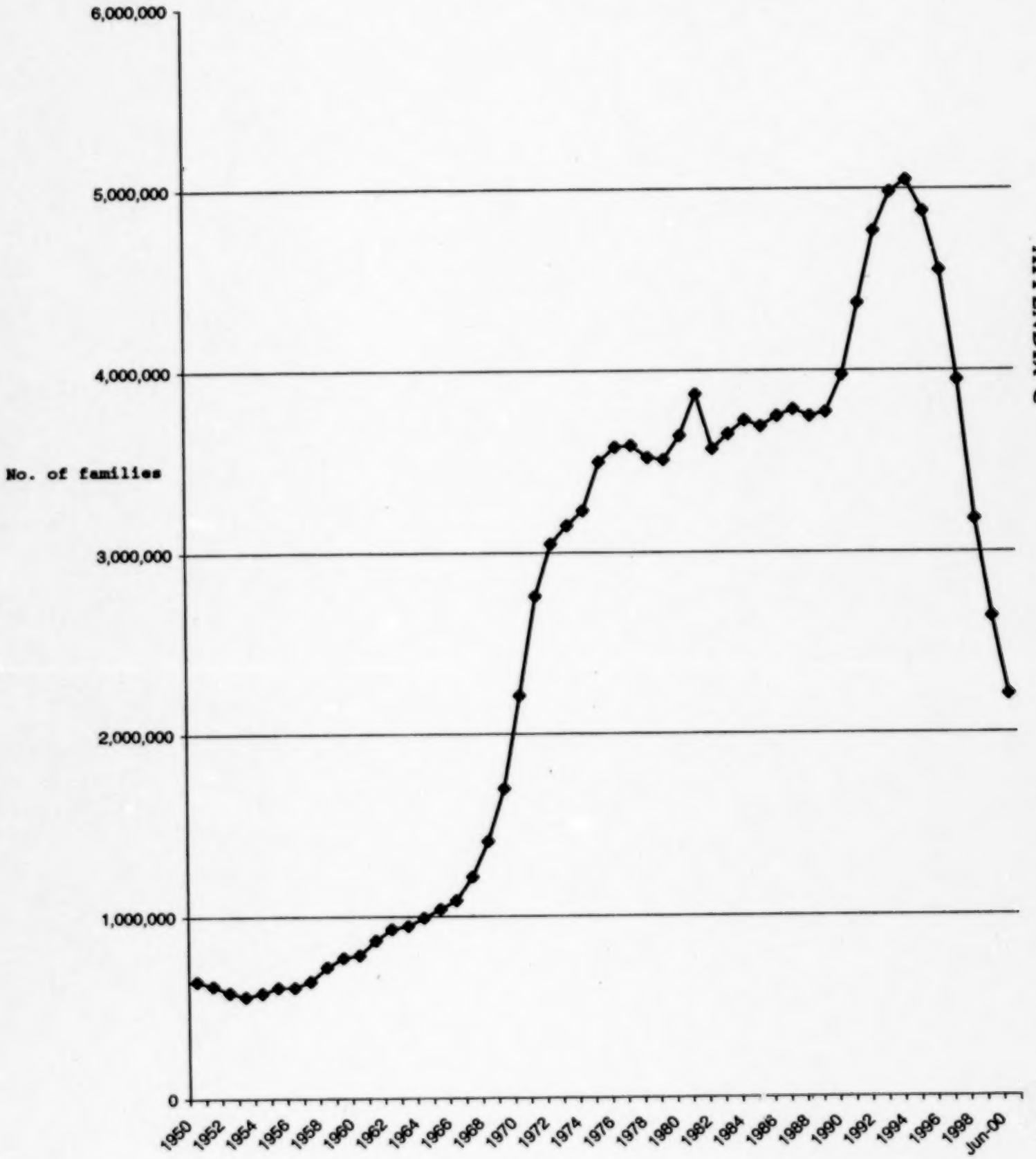


Source: Tom Everson
State of Wisconsin
Office of Justice Assistance
Uniform Crime Reporting Program (UCR)
October 13, 2001

Crime numbers consist of the standard Index Crimes used by the UCR program: murder, forcible rape, robbery, aggravated assault, burglary, theft, motor vehicle theft, and arson.

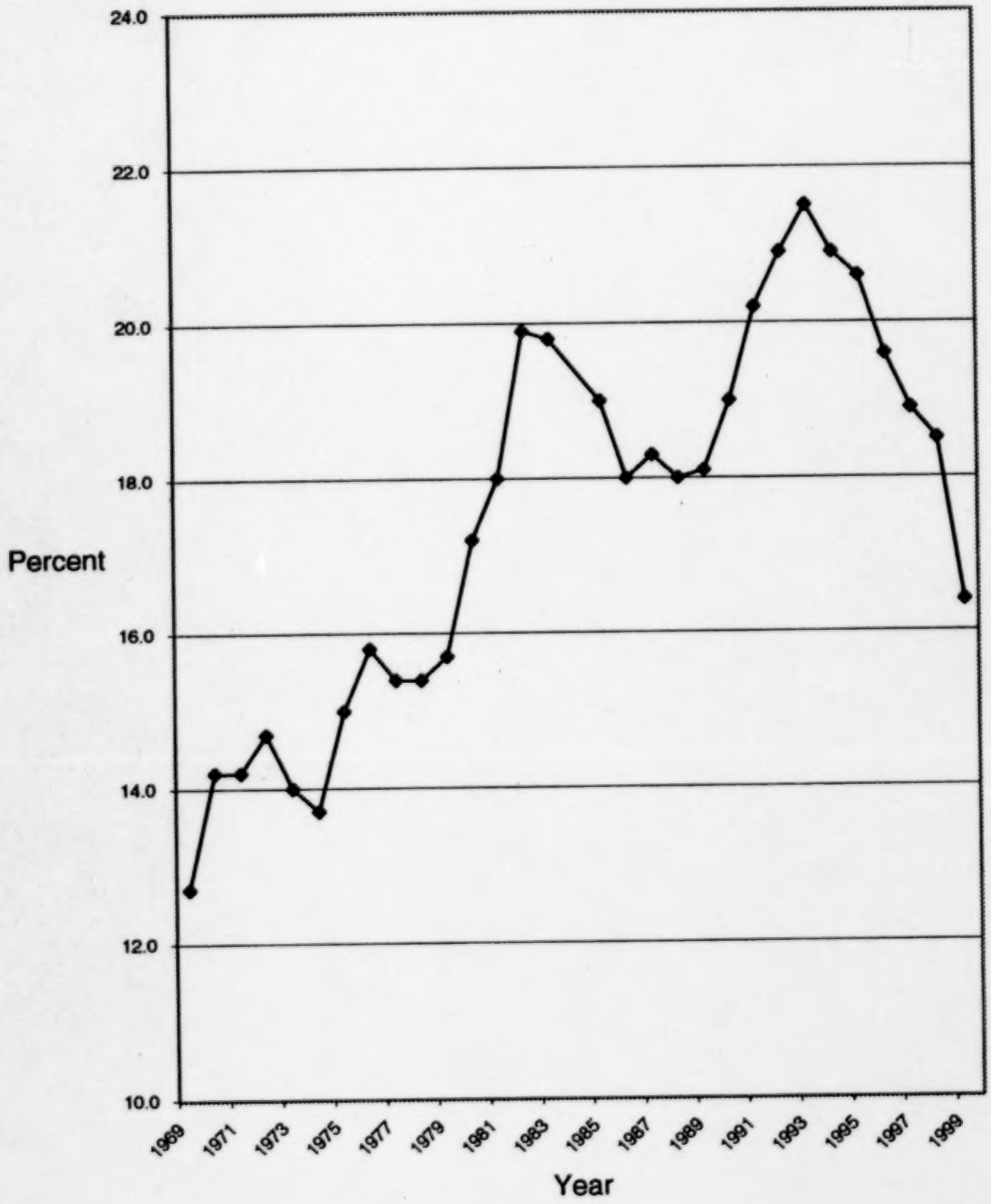
Note: Prior to 1980, arson figures were not included. An estimated 400 arsons per year have been added to all crime figures prior to 1980. Also, prior to 1975, only thefts with a stolen value of $50 or more were included. Estimates for thefts with a value of less than $50 have been added to all crime figures prior to 1975. As a result, all numbers in the graph are roughly comparable over time.

U.S. Welfare (AFDC/TANF) Caseloads: 1950-2000



Source: Administration for Children and Families, U.S. Department of Health and Human Services, http://www.acf.dhhs.gov/news/stats/3697.htm. Cash assistance to families was called Aid to Dependent Children (ADC) from 1936 to 1962, Aid to Families with Dependent Children (AFDC) from 1962 to 1996 and Temporary Assistance to Needy Families as of 1996. Unless noted, caseload numbers are average monthly.

U.S. Central City Poverty Rates: 1969-1999



Source: Current Population Survey, U.S. Bureau of the Census, U.S. Department of Commerce, "Historical Poverty Tables," Table 8: Poverty of People, by Residence: 1959-1999, http://www.census.gov/hhes/poverty/histpov/hstpov8.htm